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Supreme Court, U.S.
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No. 99-1221

In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

VICKI AMMERMAN, Guardian of PAMELA AMMERMAN, and LANA AMMERMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a punitive damages verdict rendered in a devastating personal injury case involving the "crassest form of corporate indifference to the safety of the . . . consumer" is excessive under *BMW of North America v. Gore*, 517 US 559 (1996), when the award was previously evaluated by the trial court and Indiana Court of Appeals utilizing *BMW's* three guideposts, and the remitted award was assessed not upon the defendant's economic wealth or extraterritorial conduct, but by calculating the costs necessary to correctly produce this vehicle, which amount was consistent with statutes which treble the compensatory damage award.

(2) Whether a defendant whose reprehensible behavior causes significant personal injury, resulting in a multi-million dollar compensatory damage award, had sufficient notice under *BMW's* "comparable penalty" guidepost that its conduct could result in a significant punitive damage award, when Indiana common law had long affirmed punitive damages for this type of conduct, in ratios larger than here, the legislature enacted statutory penalties twice the defendant's economic gain, which was well in excess of the punitive damages awarded here, and the award approximates treble damages authorized by statute.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

A. Nature Of Case And State Court Proceedings

This products liability case concerns the dangerous design of Ford Motor Company's ("Ford") Bronco II small sport utility vehicle ("SUV"), and the devastating injuries suffered from Ford's reckless disregard for the likely injuries it would cause. Contrary to Ford's argumentative statement of the case, the promise of *BMW of North America v. Gore*, 517 U.S. 559 (1996), has been faithfully fulfilled by Indiana's courts. For its reprehensible behavior of knowingly marketing a dangerously defective vehicle which caused severe injuries, Ford was assessed punitive damages of only slightly more than three times compensatory damages. *BMW's* guideposts, including the third one, have been met. Certiorari should be denied, as wealth forms no part of the remitted punitive award.

Ford has provided this Court with a Statement of the Case that bears little resemblance to the case tried to the jury, to the trial court's post-verdict punitive damages review, or to the Indiana Court of Appeals' unanimous decision. Ford asks this Court to review this case under *BMW*, but fails to provide this Court with a statement of the facts applicable to a *BMW* punitive damages analysis. *See* Sup. Ct. R. 14.1(g). The evidence relevant to *BMW's* guideposts are found in the decisions of the trial court and the Indiana Court of Appeals reproduced in Ford's appendix. Petitioner's Appendix, 48a-64a; 1a-44a.[1] The Ammermans provide the following summary in lieu of Ford's misleading statement.

The Bronco II had a dangerous product defect, namely, it would rollover on dry, flat pavement when the driver attempted an accident avoidance maneuver. The defect violated Ford's own design standards. App. 7a-9a.

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[1] References to Petitioner's Appendix are cited herein as "App. ___". References to the Record of Proceedings are cited herein as "R. ___".

The Ammermans presented clear and convincing evidence that Ford knew its design was likely to cause serious bodily injury due to its high center of gravity and lack of dynamic stability. App. 3a-11a, App. 25a-30a.

Ford did not move to bifurcate the trial on compensatory and punitive damages as permitted by Indiana Trial Rule 42(C). Rather, Ford filed a motion in limine requesting that evidence of wealth not be admitted until evidence supporting punitive damages had been admitted. R. 1071-77. At the close of their case, after introduction of evidence supporting punitive damages, the Ammermans submitted evidence of Ford's wealth. R. 9421-29. Ford objected to the proffer, not on constitutional grounds but instead alleging there was insufficient evidence to submit punitive damages to the jury. R. 9421-22, 9456-61. Neither the punitive damages instruction nor any instruction mentioned Ford's wealth. R. 11590-11616. The jury returned a compensatory verdict for Pamela Ammerman of $4 million and Lana Ammerman of $400,000. A verdict of $58 million in punitive damages was also awarded.

Post-verdict review of the punitive award was conducted under *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *BMW*. App. 58a-63a. The trial court specifically found that Ford knowingly and recklessly marketed a dangerously defective vehicle; that Ford failed to heed the call of its engineers to make the Bronco II safer; that Ford failed to disclose to the National Highway Traffic Safety Administration ("NHTSA") test results and data which showed the Bronco II's rollover defect; that Ford's failure to produce engineering documents was the perpetration of "an outright fraud"; and that Ford failed to meet its own design standards that the Bronco II "should have slid out on dry, flat pavement rather than rollover." App. 60a. The court held that Ford's knowledge of the defect could not reasonably be questioned, and that Ford's conduct was "the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence." App. 60a.

The court held the $58 million punitive verdict did not violate state excessiveness challenges. App. 61a-62a. Within this analysis the trial court mentioned Ford's wealth and stated that the $58 million verdict represented only 1% of Ford's net annual profits. App. 62a. Nevertheless, based upon its interpretation of *BMW's* statements regarding extraterritorial reach, the punitive award was remitted to $13.8 million. App. 62a-63a. The remitted award was based not on Ford's wealth or net annual profits, but upon its fixed retooling costs that were necessary to make the Bronco II safe. The trial court also found the remitted punitive award closely approximated treble damages, and was consistent with Indiana Code 34-4-30-1[2] which allowed such awards for offenses against property. App. 63a.

The Court of Appeals' decision agreed that Ford's conduct was the crassest form of corporate indifference, and affirmed the remitted award of punitive damages as well within the parameters of this Court's pronouncements in *BMW*. App. 34a-44a.

B. Factual Background

Ford's decision to ignore its engineers' design recommendations, to distribute the Bronco II despite its known defects, and its attempts to cover up the known dangers is accurately stated in the Court of Appeals' decision. App. 1a-12a. Briefly, Ford's design standards for the Bronco II required that it be extremely safe and that it not rollover in emergency avoidance maneuvers. R. 5960-62, 5919, 5938. The vast majority of vehicles will not rollover or tip up in emergency avoidance maneuvers. R. 7060-70. Ford knew the Bronco II had an extremely high center of gravity and a dangerous twin I-beam suspension. R. 8859-61, 7970-72, 8886-90. Recommendations to employ a safer suspension like the Chevrolet S-10 Blazer ("Blazer") were ignored. Ford rushed development of the Bronco II

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[2] Recodified as Ind. Code 34-24-3-1.

because it was well behind the Blazer. R. 7943-50, 8880, 6016, 6041.

Because of the rush to get the Bronco II to market, Ford maintained a production protocol modeled after the Jeep CJ-7 ("CJ-7"), knowing it had rollover propensities three times higher than other vehicles in its class. R. 6000-04, 7696-98, 7703, 5995, 7188, 11243. Live tests of the Bronco II resulted in numerous rollovers. Recommendations by Ford engineers to widen the track three to four inches and lower its ride height were ignored. App. 6a-7a; R. 7222, 7230, 7228-30, 7268, 7286, 6770-71, 7236. Further testing resulted in repeated tip-ups, outriggers failing, and vehicles pole-vaulting over. App. 6a-7a; R. 8809-11, 7272-74, 7214-15. Ford's engineer admitted that live testing of the Bronco II was discontinued because it was "too dangerous" for its test drivers and engineers. App. 7a; R. 8809-11.

Rather than address the problem, Ford, with the aid of its lawyers in the Office of General Counsel, collected all engineering reports bearing on Bronco II development. App. 7a-8a. Known as "Program Documentation Methodology" or sanitization, 113 documents relating to Bronco II handling were collected. App. 7a-8a; R. 1542, 6834, 6836, 6964, 8345, 10592. Fifty-three documents disappeared despite collection of numerous copies. App. 7a-8a. One document ("attachment two") describing seven major risk factors due to incomplete testing was issued just two months before production. R. 7333-35, 7337. "Attachment two" was never produced. The tests were never conducted. R. 8819-21.

As sign-off for production occurred, Ford reported an increase to the Bronco II's stability index ("SI"). Ford admitted this was due to a paper change, not an engineering change. App. 7a; R. 6045-48, 6965-68, 6074-75, 8821-22. The Bronco II Ford placed on the market had neither the wider track width nor lower center of gravity recommended by Ford engineers. R. 8879-80. In 1984, a Michelin report commissioned by Ford found no increase in the SI, contrary to Ford's report. R. 6971-74, 9278-80.

When asked by NHTSA, Ford refused to turn over its devastating test results and other rollover information including its own statistical metric which predicted the Bronco II as nearly the worst performer in rollover resistance.[3] App. 9a-10a; R. 10146, 10149, 10150, 8428-30, 8438, 8445-52. NHTSA also determined the Bronco II the overall worst. R. 8439-40, 7646-51. Ford admitted (and others concluded) that the Bronco II had rollover rates three times that of the Blazer, and higher than the CJ-7.[4] R. 8184-86, 8547-53, 10867. Moreover, in attempting to kill "a totally disastrous story" about to be published in Consumer Reports, Ford employees reported to executives that they had successfully "clouded their [Consumer Union's] minds, loosened some conclusions, . . . and sent them off to search for additional information that could work to our advantage." App. 10a-11a; R. 9264-65. Ford's guilty knowledge was confirmed when it finally conducted live tests again in 1989. R. 7339. The Bronco II

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[3] Ford suggests that its failure to produce test results to NHTSA is excusable and that this Court can take judicial notice that NHTSA has not recalled the Bronco II or adopted a stability standard. Pet. 5. At trial Ford stipulated that the issue of whether it wrongfully withheld test information from NHTSA was for the jury. R. 8486. Ford's arguments were soundly rejected by the Indiana Court of Appeals. App. 25a-30a; *see also Gamblin v. Ford Motor Company*, 513 S.E.2d 467 (W.Va. 1998). Moreover, federal law contains a savings clause for state actions. 49 U.S.C. § 30103(e). NHTSA's failure to adopt a stability standard or recall a single SUV is likely due to its "limited resources." 64 Fed. Reg. 27343.

[4] Ford mischaracterizes the Ammermans' theory that the Bronco II was defective because it had a low "static stability index." Static stability was only part of the Ammermans' theory. App. 26a. The Bronco II failed everyone's "dynamic" tests, including Ford's. App. 21a; R. 6790, 7040, 7076, 6790. Ford's documents constantly refer to "SI." Ford conceded, and actual rollover data confirmed, that "SI" is predictive of rollover. R. 10632, 5989, 6000.

instantly rolled up on two wheels and nearly barrel rolled at 37 m.p.h. Plaintiff's Ex. 425.[5]

Ford's attempt to create a different accident must be rejected. Eyewitnesses placed Watkin's initial speed in the 40 m.p.h. range, and never more than 55 m.p.h. R. 5770, 7840, 7852. Ford's attempt to boost the speed to 65 m.p.h. misrepresents the Court of Appeals' opinion which contains no such reference. Pet. 3; App. 11a-12a. Watkins decided to pass two slow moving vehicles, a pickup truck and a Blazer. As he was alongside the truck, it began to pull out and pass. He was forced to put the Bronco II's left wheels onto the shoulder. R. 7843-46, 7846. He accelerated to get past the pickup and turned the steering wheel to the right to bring the vehicle back on the road, but the Bronco II headed for the Blazer. R. 7846-47. The Bronco made "very light contact" leaving some small dents. R. 7510, 5775. Watkins turned back to the left. Believing he was headed toward a guardrail, he turned to the right, whereupon the Bronco II barrel rolled three times down the pavement. R. 5848, 5782. Ford's reconstruction expert conceded this rollover was untripped and occurred on dry, flat pavement; and that the transition from the shoulder back onto the pavement, as well as the impact between the Bronco II and the Blazer, had nothing to do with the rollover. R. 9787, 9772-73. The rollover occurred as a result of a classic avoidance maneuver. R. 7056.

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[5] Ford's continued claim that the Ammermans' emergency avoidance testing was different from others was fully addressed by the Court of Appeals. App. 13a-23a. The Ammermans' experts used course protocol similar to those of other testers. App. 13a-14a. None of the avoidance maneuvers have steering protocol. R. 7104. Ford's design standards for the Bronco II clearly indicate that steering protocol and speed should not have a bearing on stability. R. 5938, 5960, 7134. Ford's issue under Indiana Rule of Evidence 702 was properly rejected because the tests used in the industry only differ "somewhat from one another." App. 13a-23a; R. 7074-79.

Pam and Lana were thrown from the vehicle. Pam suffered severe physical injuries including a skull fracture, swelling of the brain, a crushed pelvis, and a fractured clavicle. Pam has permanent brain damage. She has the mental capacity of a child and suffers from a bi-polar condition. App. 11a-12a; R. 5677, 6855, 6923, 8614. Lana also suffered severe physical injuries to her face, head, neck, right clavicle, left leg, and left lung. R. 8858-68, 8590, 6645-46. Ford does not challenge the compensatory damage awards for these injuries.

REASONS FOR DENYING THE WRIT

Less than four years after this Court decided *BMW*, Ford asks this Court to revisit it to "resolve the conflicts and confusion that have arisen since *BMW* . . . and to ensure that the . . . guideposts continue to have meaningful effect." Pet. 9. Ford contends additional action is necessary because there has been an outbreak of record-setting awards against the country's largest automobile manufacturers, and because lower courts continue to uphold excessive awards on grounds inconsistent with *BMW*. Pet. 8-9. In particular, Ford contends that lower courts evade *BMW's* guideposts by relying on a factor rejected by *BMW* – the defendant's worldwide wealth and profits – to uphold huge punitive awards. *Id.*

This issue is not raised in this case. Ford's wealth was not the basis for the jury's original award of punitive damages, the trial court's remitted punitive damages award, or the Court of Appeals' affirmation of that award. Rather, Ford's reprehensible behavior, and the need to deter its conduct, formed the basis for the award.

Even if this issue were presented, it is not worthy of review. Ford erroneously suggests that lower courts are forbidden to apply their own common law tests in addition to *BMW's* guideposts. Ford also presumes *BMW's* guideposts are preclusive, eradicating over two hundred years of common law which evaluates various factors,

including a defendant's wealth, in determining whether a punitive damage award is excessive under state law. There is no conflict in the cases on these points. Moreover, the remitted punitive award was less than the Indiana profit Ford gained from selling the Bronco II, and Ford fails to show, or even argue, that the remitted award is excessive under *BMW's* guideposts because of the alleged injection of wealth into the constitutional calculus.

Ford has already received all due process, procedural and substantive, that it was entitled to because Ford has already received the benefit of remittitur under *BMW*. After hearing weeks of testimony and viewing hundreds of Ford's internal documents, the jury assessed $58 million in punitive damages. The trial court engaged in a searching review of the record post-verdict and considered a panoply of Ford's arguments, including excessiveness and due process. That court held that the award was not excessive under Indiana common law because "taken as a whole, the [. . .] facts support the jury's award of punitive damages, and . . . [t]he verdict was based upon rational, objective criteria reasonably calculated to punish Ford for its wrongful actions." App. 62a. The trial court held that Ford's "continued push to production of this product after all of the internal protestation to the contrary is the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence." App. 59a-60a. After concluding it was essential to Indiana consumers to deter other vehicle manufacturers from repeating Ford's tragic actions, the trial court nevertheless remitted the award under *BMW*, concluding the jury unwittingly offended the Constitution by assessing punitive damages upon all 700,000 Bronco II's sold worldwide. Because the Watson vehicle could have been made safer had Ford expended $13,800,054, the court remitted the verdict to that amount concluding that it was parochial enough to satisfy the Commerce Clause, was not grossly excessive, and was substantial enough to have the desired deterrent effect on

Ford. Moreover, the court noted the figure approximated treble damages under Indiana's civil code for offenses against property. App. 63a.

The jury's verdict of $58 million was sound, both under Indiana common law, and *BMW's* three guideposts. Nevertheless, the trial court reduced the award by over 75% in order to remove any extraterritorial reach caused by the jury's consideration of the cost to correct out-of-state vehicles. Ford's suggestion that the remitted award, which was cleansed of any extraterritorial reach and was calculated upon state law grounds, violates due process under *BMW* because its wealth was a factor, completely lacks merit.

A. Punitive Damages Were Imposed To Deter Ford's Reprehensible Conduct, Not Based On Wealth

1. The Original And Remitted Punitive Verdicts Were Assessed On State Law Grounds

Ford's wealth is not, and never has been, a component of the calculus for punitive damages. Instead, the jury, trial court, and Court of Appeals were primarily, if not exclusively, concerned with deterring Ford's reprehensible behavior. Nothing in the trial or the post-judgment reviews suggests that Ford's wealth was a factor in the punitive damages equation. Because the remitted punitive awards were calculated on unchallenged state law grounds, this case does not present any federal due process issue. Ford's argument presumes that because the jury and judiciary were aware of its wealth, it must have affected the judgment. However, this Court has already held if "fair procedures were followed a judgment that is a product of that process is entitled to a strong presumption of validity" and Ford has never challenged the process itself. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Ford can never carry its burden of proving that the remitted award was unconstitutional.

Ford's wealth was not a significant factor for the jury. Evidence of Ford's wealth was not introduced until the close of the plaintiffs' case, without extended discussion or argument. R. 9421-29. During the Ammermans' closing argument, counsel did not focus on Ford's economic wealth, but instead focused on Ford's gain from the Bronco II, contending the jury could (1) triple the compensatory damage awards; (2) multiply the $83 per unit cost, or the 2.5% of additional profit that Ford realized, by the 468,000 units that Ford anticipated selling; or (3) multiply the $83 per unit times the 700,000 vehicles Ford actually sold. R. 11455-56. Although the trial court remitted the award to remove any profit from sales outside Indiana, this case does not present the same concerns as *TXO*, where the defendant's wealth and out-of-state status were repeatedly referenced by counsel throughout the trial. *TXO*, 509 U.S. at 485-493 (O'Connor, J., dissenting).

No jury instruction was given referencing Ford's wealth. Instead, the jury was appropriately instructed that once the predicate conduct had been established, punitive damages "may be awarded in such sum as you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future". R. 11608-09. Ford tendered a similar instruction. R. 1789-90. The jurors were obligated to follow this instruction in reaching their verdict. *Griffin v. Acker*, 659 N.E.2d 659 (Ind.Ct.App. 1995), *trans. denied*.

Likewise, the trial court's analysis, and its remittitur calculation, did not focus on Ford's wealth, but rather on the need to deter Ford's reprehensible behavior. In response to Ford's post-verdict request for remittitur, the court entered an extensive order which summarized the salient facts. App. 49a-54a. The court found "[t]aken as a whole, these facts support this jury's award of punitive damages" and they established, by clear and convincing evidence, that "before, during and after production, [Ford] had knowledge that the Bronco II had a dangerous propensity to rollover"; that testing was suspended because it was too dangerous for the test drivers; that

Ford's pre-production document gathering and sanitization was at best an attempt to soften the impact of its internal documents, and at worst, was the perpetration of an outright fraud; and that Ford's "continued push to production of this product after all of the internal protestation to the contrary is the crassest form of corporate indifference to the safety of the ultimate user or consumer." App. 59a-60a. The court concluded it was "essential to Indiana consumers to deter other vehicle manufacturers from repeating [Ford's] tragic actions." App. 61a.

In deciding the amount of damages to assess, the court turned to *BMW*, and in accordance with its guidelines, first considered the nature of the tort, concluding that the tort was "the placing of a potentially lethal product in the stream of commerce with a heedless disregard for public safety." App. 61a. The court held that "relating this tort and the corporation's apparent state of mind to the mangled bodies, permanent disfigurement and brain injury sustained by the Plaintiffs . . . justifies a substantial punitive damage award." *Id.* It evaluated the original jury award in light of Ford's net worth and profits, holding the jury's verdict of $58 million was not excessive under state common law. *Id.*

In remitting the judgment to eliminate any extraterritorial reach, the court did not rely, or even refer to, Ford's wealth. It instead created its own state-based formula. The court noted that the one-time retooling cost to change the manufacturing process was estimated at $13,800,000, and the cost of additional hardware on each vehicle was $54. The court held the Watson vehicle could have been made safer by Ford's expenditure of $13,800,054, and entered judgment for that amount. App. 63a. This calculation was not based on Ford's nationwide profits, wealth, or net worth, but on Ford's costs to remove the defect from the Watkins vehicle. Ford cannot demonstrate that this approach to punitive damages violates its due process rights.

Moreover, the trial court relied on Indiana grounds as further support for its recalculation of punitive damages. It concluded the remitted judgment was substantial enough to have the desired deterrent effect upon Ford, and it approximated Indiana's statutory penalty of treble damages for offenses against property. App. 63a. The trial court's analysis and the judgment it rendered are appropriately state-based in form and intent, and in no way implicates Ford's nationwide wealth or profits. Accordingly, Ford cannot maintain a federal due process claim.

Likewise, Ford cannot complain that its wealth or profits influenced the Court of Appeals' analysis. The Court of Appeals' opinion addresses Ford's due process argument utilizing, as it should, *BMW's* three guidelines. App. 39a. After addressing each of the three guideposts, the Court unanimously concluded that the remitted award of punitive damages was appropriate under *BMW*. The opinion in no way relied upon Ford's wealth or profits from other jurisdictions to avoid *BMW's* three prongs. Accordingly, Ford's Petition should be denied.

2. Because The Punitive Award Was Less Than Ford's Indiana Profits, It Could Never Be Excessive

Assuming, *arguendo*, that the remitted punitive award was somehow tainted with Ford's wealth and extraterritorial profits, despite the state-based calculus used by the trial court, Ford still cannot demonstrate prejudice. The remitted award was much less than the Indiana profits Ford reaped from its sale of the Bronco II, and thus the award cannot be considered excessive.

Ford admittedly sold 11,452 Bronco II's in Indiana, with a $3,570 profit per vehicle. R. 126, 7195. Thus, Ford reaped an Indiana-based profit of $40,883,640 from this product, well in excess of the remitted award of $13.8 million. Three members of this Court have already recognized that the removal of the defendant's profit from the illegal activity is a factor that has the ability to limit

awards to a fixed, rational amount. *BMW*, 517 U.S. at 591 (Breyer, J., dissenting). A punitive damage verdict which is no more than the defendant's profit from the illegal activity is appropriate, because the punitive award should eliminate the prospect of gain by the offender. *See, Cummings Medical Corp. v. Occupational Medical Corp. of America, Inc.*, 13 Cal.Rptr. 2d 585, 589 (Cal.Ct.App. 1992), *rev. denied*, and cases cited therein. Although a gain-based measure of punitive damages may sometimes not be enough to deter future misconduct, it is never too much. *BMW*, 517 U.S. at 589-590.

Ford could have been sanctioned for the entire amount of its Indiana gain, because all Bronco II's sold in Indiana were sold with the same dangerous defect. Ford never recalled nor modified the vehicle. App. 60a. A sanction which is only thirty-five percent of Ford's ill-gotten Indiana profits is not excessive, or more than is necessary for deterrence.

3. Ford's Wealth-Based Excessiveness Arguments Were Waived During The State Court Proceedings

It is axiomatic that constitutional issues must first be properly raised in state court, so the state court has the opportunity to decide the question. *TXO*, 509 U.S. at 464. Ford failed to preserve its economic wealth issue in the trial court, and failed to present the question to the Indiana Supreme Court. Ford conceded during trial that its net worth and economic wealth was evidence appropriate for jury consideration on the punitive damages claim. Ford never requested bifurcation of the punitive claim or tendered any instruction to limit the jury's consideration of the evidence. Moreover, Ford did not object to any punitive damages instruction given to the jury. The jury was instructed that if it awarded compensatory damages, and by clear and convincing evidence found that Ford had acted willfully or wantonly, with conscious disregard for probable injury or gross negligence, it could

award punitive damages in such sum "as you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future". R. 11608-9.

Although Ford filed numerous motions in limine, it never requested exclusion of its economic wealth; it only requested it not be admitted until the plaintiffs had established their case in chief. R. 1071-77. Accordingly, the Ammermans only proffered evidence of Ford's economic wealth at the close of their case. R. 9421-29. When the evidence was admitted, Ford's sole objection was that wealth was irrelevant because there was insufficient evidence to submit punitive damages to the jury. R. 9421-22; 9456-61. Ford failed to object on any due process ground. Likewise, Ford failed to raise "wealth" as a due process issue before the Indiana Supreme Court, and accordingly, this Court may decline to entertain this question on certiorari. *TXO*, 509 U.S. at 464.

Ford's repeated failure to raise this argument during the state court proceedings is understandable, and consistent with the manner the case was adjudicated. Neither the jury nor the trial court assessed its punitive sanction based upon Ford's wealth, and the Court of Appeals affirmed the judgment on both state common law grounds and due process grounds unrelated to net worth. Ford's 11th hour attempt to convert this case into one which presents a question of punitive damages based on economic wealth must be rejected.

4. The Remitted Judgment Is Consistent With *BMW's* Three Guideposts

Even if Ford could demonstrate that its economic wealth was implicated in the calculation of punitive damages, the judgment is still appropriate. The trial court's remitted award was entirely consistent with *BMW's* guideposts, which is evident not only from the trial court's order, but from the Court of Appeals' opinion which affirmed the remitted award on that basis. Notably,

Ford fails to address how this verdict was "excessive" under *BMW*. It instead claims that other recent, and much larger, punitive awards from other jurisdictions are excessive when those judgments are based on unknown facts, and have not yet completed appellate review. Pet. 8-9. Whether other punitive verdicts are worthy of review remains to be seen; however, the fact they were rendered does not make the present judgment excessive.

Both the trial court and the Court of Appeals were cognizant of *BMW's* teachings, and followed them to the letter. Ford fails to address *BMW's* first two guideposts or show how they were not satisfied. Ford's plea for certiorari rests primarily upon its misperception that some courts hold a defendant's wealth sustains a grossly excessive punitive award under *BMW*, while other courts reject that notion. Pet. 15-16. In either case, excessiveness under *BMW* is the key. Neither camp suggests a punitive award which is **constitutional** under *BMW* is excessive **merely** because a defendant's economic wealth was admitted into evidence. Ford's failure to argue that the remitted judgment is excessive under *BMW's* guideposts makes the perceived dichotomy between these cases and this litigation an academic exercise.

Ford's failure to engage *BMW* is as understandable as it is outcome determinative. This case does not present the question of punitive damages for economic losses resulting from a "paint job". Rather, this case "involv[es] [a] grave physical injury imposed on a helpless citizen by a callous malefactor". *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting). *BMW* provides compelling grounds to sustain the remitted judgment.

a. Degree of Reprehensibility

The degree of reprehensibility is the most important indication of the reasonableness of the punitive award. Exemplary damages should reflect "the enormity of [the] offense." *BMW*, 517 U.S. at 575. In *BMW*, none of the

aggravating factors associated with reprehensible conduct were present; the harm inflicted on the plaintiff was purely economic. Moreover, **BMW's conduct evidenced no indifference to, or reckless disregard for, the health and safety of others.** *Id.*

By comparison, the Indiana jury and trial court heard compelling evidence that Ford was indifferent to, and exhibited reckless disregard for, the health and safety of its consumers. This is not a case where only economic damages were at stake; rather, the lives and welfare of thousands of Bronco II purchasers and the motoring public were at issue. Ford knew of the Bronco II's "critical handling problems"; discontinued all on-track limits testing after repeated rollovers; sanitized and destroyed incriminating documents; concealed adverse rollover testing and its metric from NHTSA knowing it was predictive of rollover risk and rated the Bronco II the overall worst; and "clouded the minds" of the public regarding the Bronco II's rollover propensity. Ford's "crass corporate indifference" resulted in life-threatening, debilitating and permanent injuries to two young women who will never fully recover. Ford's conduct exemplifies the callous, wanton conduct that was absent in *BMW*. *Id.* at 579.

A recidivist may be punished more severely than a first offender because repeated misconduct is more reprehensible than an individual instance of malfeasance. *Id.* at 577. "[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required." *Id.* at 576-77. This Record is replete with Ford's knowing, yet **repeated**, engagement in prohibited conduct over the course of several years, both pre-production and post-production. Moreover, Ford's continued culpable behavior, in light of the multi-million dollar sanctions received for marketing other defectively dangerous vehicles, demonstrates recidivism. *See*, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348 (Cal.Ct.App. 1981) (Pinto). *BMW* makes a "promise", but not the one Ford suggests; its promise is

that strong medicine is still appropriate to cure disrespect for personal safety.

b. Ratio of Punitive Damages to Harm Inflicted

In *BMW* this Court refused to draw a mathematical bright line between the constitutionally acceptable and unacceptable, applying a "general concern of reasonableness." **In particular, a higher ratio of punitive damages may be appropriate where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."** *Id.* at 582 (emphasis added).

The jury awarded punitive damages of 13 times the total compensatory award. As the trial court found, this award does not rise to the 500:1 level which "raise[s] a suspicious judicial eyebrow." R. 5133. Nevertheless, when the award was remitted to $13.8 million, the ratio was reduced to a total of 3 to 1. This reduced ratio is not "breathtaking" in light of the reprehensibility of Ford's conduct. Moreover, the Ammermans' permanent physical and mental injuries are "non-economic harm[s] which [are] difficult to determine." *BMW*, 517 U.S. at 582. Ford's failure to address this prong of *BMW* is telling, and concedes the appropriateness of the remitted verdict.

c. Sanctions for Comparable Misconduct

BMW's third factor compares punitive damages to civil or criminal penalties that could be imposed for comparable misconduct. Because Ford has raised this guidepost as a separate ground for certiorari, it will be addressed in Section C, *infra*.

d. Post-*BMW* Decisions

The remitted judgment is consistent with the punitive damage judgments this Court considered in light of *BMW*, and then denied certiorari. For example, in *Oberg v.*

Honda Motor Co., 888 P.2d 8 (Or.Ct.App. 1995), *cert. denied*, this Court denied certiorari leaving intact a $5 million punitive damages verdict in a product liability case involving personal injury (and where net worth of the defendant was a factor in post-judgment review). In *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), a truck's defective wheel caused one death and one injury. This Court denied certiorari, leaving a total of $4 million in punitive damages intact. Although the denial of certiorari has no precedential value, none of the six cases subject to remand orders in light of *BMW* involved personal injury or death. *See, Ford Motor Co. v. Sperau*, 708 So.2d 111 (Ala. 1997); *Union Security Life Ins. Co. v. Crocker*, 709 So.2d 1118 (Ala. 1997), *cert. denied*; *American Pioneer Life Ins. Co. v. Williamson*, 704 So.2d 1361 (Ala. 1997); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied*; *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*; *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex.Ct.App. 1997), *review denied*; *see also, Axen v. American Home Products Corp.*, 974 P.2d 224 (Or.Ct.App. 1999), *cert. denied* ($20 million punitive award affirmed for manufacturer's knowledge of drug-induced blindness).

The remitted judgment is entirely consistent with *BMW's* guideposts, and with the exception of the last factor, Ford does not argue otherwise. Because Ford cannot demonstrate that this judgment violates *BMW's* due process boundaries, it cannot prove the judgment is excessive.

B. The State Courts' Continued Use Of Wealth As An Additional Common Law Factor To Measure Deterrence Does Not Present A Question Worthy Of Review

Even if this Court believed this case presents the issue Ford posits, and that resolution of the issue would change the punitive damages verdict, Ford's petition for

certiorari should be denied on the merits. Ford's contention that this Court intended, by issuing *BMW*, to eliminate the use of factors other than *BMW's* three guideposts in evaluating whether a punitive award is excessive, is erroneous. The lower courts are not in conflict on this question, and this issue is not important, substantial or recurring.

1. This Court Never Intended To Eradicate State Common Law Factors Used To Evaluate Excessiveness And The Need For Deterrence

Punitive damages have been recognized since at least 1763, and have been firmly ingrained in our nation's common law for at least 200 years. *Callaghan*, PUNITIVE DAMAGES LAW AND PRACTICE, §§ 1.01, 1.02; *see also*, *Haslip*, 499 U.S. at 14. Likewise, it is beyond dispute that under modern law the primary reason for imposing punitive damages is to deter recidivism and to deter others from engaging in the same culpable behavior. *Callaghan*, §§ 2.07, 2.09. This Court acknowledged that punitive damages might properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. *BMW*, 517 U.S. at 568; *Haslip*, 499 U.S. at 19. Given these precepts, it is the general rule in nearly all jurisdictions that evidence offered by the plaintiff about the defendant's financial status is admissible if other evidence supports the submission of a punitive damages claim to the jury. *Callaghan*, § 5.36; MODEL PUNITIVE DAMAGES ACT § 4(a) (1996). Evidence of the defendant's financial situation is important for the jury to determine the sum that will be adequate to punish the defendant and to deter similar conduct in the future. In other words, it may take more money to punish or deter a wealthy defendant than it would to punish one of only modest means. *Id.*, § 5.36.

BMW was decided against this backdrop of firmly established common law. This Court opted to review *BMW* because it "would help to illuminate 'the character

of the standard that will identify unconstitutionally excessive awards' of punitive damages." 517 U.S. at 568. This Court noted that "in our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." *Id.* For this reason, the Court opined that the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. *Id.* The Court's creation of three "guideposts" was designed to ensure that a defendant receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. *Id.* The fact BMW was a large corporation rather than an impecunious individual did not diminish its entitlement to fair notice of the state's demands on the conduct of its business. *Id.* at 585.

The Ammermans do not suggest that Ford is not entitled to fair notice of Indiana's demands; rather, the Ammermans have conclusively demonstrated that Ford **had** fair notice of those demands, given its undisputed satisfaction of *BMW's* guideposts. However, *BMW* does not suggest that this Court intended to make its guideposts preclusive, or eliminate other factors, such as wealth, to gauge the state's interest in deterrence.

The majority's use of the term "guideposts" to designate the three prongs associated with fair notice is indicative of its intent that these factors are guides only. Likewise, the majority opinion notes the Alabama Supreme Court applied the state common law test for excessiveness, including the impact on the defendant's financial position, and that court's conclusion "the judgment would not have a substantial impact upon [BMW's] financial position." *BMW*, 517 U.S. at 566. Had this Court intended to preclude any state from considering the

defendant's financial position, presumably it would have commented on this point in its Opinion. This omission is noted in the dissenting opinion: "the Court nowhere says that these three 'guideposts' are the only guideposts; indeed it makes very clear that they are not – explaining away the earlier opinions that do not really follow these 'guideposts' on the basis of additional factors, thereby 'reiterat[ing] our rejection of a categorical approach' ". *Id.* at 606 (Scalia, J., dissenting). The concurring Opinion discusses Alabama's consideration of the financial position of the defendant, and concludes that "since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives)." *Id.* at 591 (Breyer, J., concurring). After noting that this factor may inflate awards when the defendant is wealthy, the concurring Opinion concludes that "does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as reprehensibility to constrain significantly an award that purports to punish a defendant's conduct." These words could have been written for the instant case: Ford's unchallenged satisfaction of *BMW's* guideposts forecloses any contention that its wealth resulted in an unconstitutionally inflamed punitive award.

Alabama's decision to give weight to several factors, including the defendant's financial position, were standards the Court had previously held "impos[ed] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *BMW*, 519 U.S. at 610-611 (Ginsberg, J., dissenting), citing *Haslip*, 499 U.S. at 22, and *TXO*, 509 U.S. at 462. This Court noted that it had more than once approved the common law method for assessing punitive damages and after two hundred years of practice, it would need a strong case for the Fourteenth Amendment

to affect it. *Haslip*, 499 U.S. at 15, 17. The Court warned that the lower courts may embrace a number of factors, so long as the factfinder is guided by **more** than the defendant's net worth. *Id.* This language does not suggest that a passing reference to a defendant's wealth, in conjunction with a number of other factors, including *BMW's* guideposts, is constitutionally suspect. *See, Haslip*, 499 U.S. at 52 (O'Connor, J., dissenting) (suggesting that vagueness could be eliminated if the "Green Oil factors", including the financial position of the defendant, were given to the jury).

Likewise, *TXO* rejected the argument that the admission of evidence of wrongdoing in other parts of the country, and impressive net worth, led the jury to base its award on impermissible passion and prejudice. 509 U.S. at 462, n.28. This Court held that "under well-settled law, however, factors such as these are typically considered in assessing punitive damages" and had been approved in *Haslip*. *Id.* While the Court was concerned that the jury instruction which emphasized the wealth of the wrongdoers increased the risk the award may have been influenced by prejudice against large corporations, that issue is not implicated here, as this Indiana jury was not instructed to consider Ford's wealth, only the need to deter Ford's culpable behavior. *Id.* at 464; *see* R. 11609-10. Furthermore, as here, TXO's belated constitutional attack was not properly presented to the highest court of the state, and thus this Court refused to pass on it. *TXO*, 509 U.S. at 464.

The four dissenting justices in *TXO* conceded that consideration of a defendant's wealth was not unconstitutional, and wealth of the perpetrator was long thought to be relevant. *Id.* at 491-492. However, the dissenting justices were concerned with the over 500-1 ratio of punitive damages to compensatory damages; the fact

the jury instruction linked deterrence to TXO's wealth; the fact that counsel argued only one measure for punitive damages (TXO's wealth); and that counsel repeatedly reminded the jury that TXO was a wealthy, out-of-state corporation. *Id.* at 487-495. None of those concerns is present here, where the overall ratio of punitive to compensatory damages is 3:1, the jury was not instructed to consider Ford's wealth, and the Ammermans' counsel did not focus on Ford's wealth or non-resident status during the trial or in closing argument. There is no basis for Ford's assertion that the instant judgment violates due process merely because evidence of its economic wealth was admitted.

2. There Is No Irreconcilable Conflict In The Cases Interpreting *BMW*

To obtain certiorari, Ford must demonstrate a real or intolerable conflict in the law on an important question of federal law which is irreconcilable, and not subject to a permissible difference of opinion from various state courts. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 4.3, 4.4. Ford suggests that numerous courts are using a defendant's wealth as a "trump" card to avoid remitting an otherwise excessive judgment under *BMW's* guideposts, or as a proxy for a "proper" analysis under *BMW*. Pet. 11-15. The Ammermans contend these cases do not support Ford's proposition. The great majority of cases, both state and federal, faithfully apply *BMW's* guideposts to determine whether a punitive judgment is excessive. Those cases also review a number of other common law factors, including economic wealth, in gauging a judgment's excessiveness. In making this comprehensive analysis, there is no intent to evade *BMW's* teachings; rather, the courts have simply not limited their analysis to *BMW's* factors alone. The great majority of courts that have addressed the question of excessiveness continue to apply both federal and state factors, and make a dual analysis under both state common law and federal due

process principles. Although the lower courts may differ in the emphasis they place on the defendant's financial status, that differential suggests only historical differences embodied in each state's common law, which is inherent in our federal system.

3. This Issue Is Not Important, Substantial Or Recurring

Ford makes several erroneous propositions: (1) it questions the court's "commitment to do equal justice to the rich and poor"; (2) the use of corporate wealth is irrational; (3) compensatory damages have significant deterrent effects; and (4) reliance on a corporation's worldwide wealth flouts *BMW's* ban on extraterritorial punishment. Pet. 16-21. Notably, Ford fails to recognize there can be no "inflamed" punitive award based upon corporate wealth in Indiana, given Ind. Code 34-51-3-5 which limits punitive damages to the greater of three times compensatory damages or $50,000, irrespective of wealth. Likewise, as Justice Ginsberg noted, a number of states have legislatively limited punitive damages. *BMW*, 517 U.S. at 614 (Appendix).

Secondly, Ford's precepts about "justice to the poor" and the "deterrent effect of compensatory damages" ignore the very reasons punitive damages exist. Compensatory damages are awarded to afford "justice to the poor", i.e., to make the victim whole. While monetary damages can never accomplish this feat when individuals, like the Ammermans, suffer lifetime disabilities, those damages should never be confused with the rationale for punitive damages: punishment and deterrence. If compensatory damages were sufficient to deter reprehensible behavior, Ford would have recalled the Bronco II. Unfortunately, Ford continues to weigh the cost of a recall with the cost of compensation, and has determined that litigation is the best economic course for the company. *See, Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470

(Ga.Ct.App. 1984) (awarding $8 million in punitive damages to deter Ford from delaying implementation of safety device to protect its profits); R. 7268, 7286 (Ford rejects track increase to avoid jeopardizing release).

Ford is not being punished for having wealth outside the State of Indiana: it is being punished for its culpable behavior within the state. Having engaged in that conduct, Ford is not afforded immunity because it chooses to operate nationwide. Rather, Ford must be treated the same as all corporations, including those engaged solely in intra-state operations. If Ford's theory of extraterritoriality is adopted, multi-state companies can dilute any one state's ability to assess a deterrent award to protect its own interests. *BMW* never intended to shield non-resident corporations from their own wrongdoing simply because of their non-resident status. Instead, evidence relevant to determining the degree of reprehensibility is relevant, even if it occurs out of state. *BMW*, 517 U.S. at 574, n.21.

C. The Indiana Court Of Appeals Correctly Applied The Third *BMW* Factor, Giving Ford Fair Notice Of The Penalty

The third factor which determines whether a defendant had fair notice of the severity of the penalty imposed is the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *BMW*, 517 U.S. at 574-75. Ford was afforded more than "adequate notice of the magnitude of the sanction", *Id.* at 574, that an Indiana court might impose on a product manufacturer for willfully placing a "potentially lethal product into the stream of commerce with a heedless disregard for public safety." App. 61a.

In *BMW*, the defendant's conduct was comparable to a violation of Alabama's Deceptive Trade Practices Act, which carried a maximum civil penalty of $2,000. Moreover, there were no judicial decisions in Alabama or elsewhere indicating that *BMW's* policy might give rise to

a $2 million punitive award. *Id.* at 584. By contrast, Ford had ample notice its actions could subject it to severe sanctions. Although there is no comparable civil or criminal statutory penalty in Indiana for the manufacture and sale of a defective product (*see* App. 42a), and the violation of common law duties does not lend itself to a comparison with statutory penalties under this factor of *BMW, Continental Trend Resources, Inc.*, 101 F.3d at 641, both the criminal and civil statutes provide some guidance regarding Indiana's "legislative judgments concerning appropriate sanctions for conduct at issue." *BMW*, 517 U.S. at 583 (citations omitted).

The trial court noted that the punitive damages award "approximates the treble damages allowed under our civil code for offenses against property." App. 63a. Although a comparison to criminal statutory penalties is largely irrelevant when, as here, the conduct at issue is not contemplated by legislative action, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997), Ford nevertheless contended to the Court of Appeals that its conduct was analogous to criminal recklessness, pursuant to Ind. Code 35-42-2-2(c), and urged a comparison of the penalty for that offense with the punitive damages awarded. App. 42a n.23. Criminal recklessness, a felony, carries a maximum monetary penalty of $10,000, and includes imprisonment for up to three years. Ind. Code 35-50-2-7. Even if this statutory penalty applied, it provided Ford with ample notice of a significant monetary sanction. Because each instance where a Bronco II was placed into the Indiana stream of commerce constitutes a separate violation of the statute, Ford risked being penalized $10,000 for each of the 11,452 Bronco II's it sold in the state, for a total of $114 million in monetary penalties. R. 125.

In addition, Indiana statutes provide an alternative penalty for a criminal offender, namely, "a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by the victims of the offense he committed." Ind. Code 35-50-5-2. At twice its pecuniary gain from the

sale of Bronco II's in Indiana, Ford was on notice it could incur a monetary penalty of $81,767,280 (the amount of profit Ford realized per vehicle ($3,570) times the 11,452 Bronco II's sold in Indiana times two). R. 125, 7195. At twice the victims' pecuniary loss, Ford was on notice it could incur a monetary penalty of $8,800,000 (the compensatory award of $4,400,000 times two).

Prior Indiana punitive damage awards also gave Ford ample notice that its actions could subject it to severe sanctions. At the time this tort occurred,[6] Indiana had already sustained punitive damages in ratios of 68:1 and 150:1. *See Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind.Ct.App. 1990), *trans. denied, cert. dismissed* ($750,000 punitive and $11,000 compensatory award); *Emerson v. Markle*, 539 N.E.2d 35 (Ind.Ct.App. 1989), *trans. denied* ($150,000 punitive and $1,000 compensatory award). Indiana appellate courts affirmed a $5 million punitive damages award and $1,690,895 actual damages award in a products liability case where no personal injuries were sustained. *Dow Chemical Co. v. St. Vincent Hosp. & Health Care Ctr.*, 553 N.E.2d 144 (Ind.Ct.App. 1990). These decisions gave Ford notice it could be held liable for the magnitude of punitive damages awarded.

Ford contends that review is warranted because of a perceived conflict among lower courts in applying *BMW's* "comparable penalty" guidepost. However, Ford presents no direct and mature conflict in other jurisdictions requiring resolution by this Court. A careful reading of Ford's

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[6] Ford misleadingly contends the largest award affirmed in Indiana was $150,000 in a case decided in 1984, apparently under the erroneous assumption that its wrongful conduct occurred before its manufacture of the Watkins vehicle. *See* Pet. 24. However, Ford committed the continuing wrong of placing dangerously defective vehicles on Indiana roads. App. 30a, 60a-61a. Thus, the state court decisions which gave prior notice are those rendered prior to the accident, because until then Ford had the option of recalling its defective product from the marketplace.

cases reveals no disregard for the comparable penalty factor, but merely a recognition that statutory penalties, particularly those authorizing imprisonment as well as fines, were not designed to deter corporations from committing civil wrongdoing. *See Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d at 165 (trespass, property damage); *Green Tree Acceptance of Texas, Inc. v. McGrath*, 1998 WL 337755, at *5 (Tex.Ct.App. 1998) (trespass, property damage, deceit); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337-39 (11th Cir. 1999) (water pollution); *BMW of North America, Inc. v. Gore*, 710 So.2d 507, 514 (Ala. 1997) (profit from wrongful conduct exceeds penalty); *Jimenez v. Chrysler Corp.*, 74 F.Supp.2d 548, 584 (D.S.C. 1999) (penalties not applicable to products liability case); *Wal-Mart Stores, Inc. v. Robbins*, 719 So.2d 245, 246 (Ala.Ct.App. 1998) (degree of reprehensibility and personal injuries sustained given greater weight than low statutory penalty). "[M]any serious criminal offenses [are] chiefly aimed at individuals, rather than corporate entities, where the principal sanction is imprisonment, and the monetary penalty is relatively small. In this situation, the criminal fine for similar misconduct is not very pertinent in reviewing an award of punitive damages." *Bowden v. Caldor, Inc.*, 710 A.2d 267, 286 (Md.Ct.App. 1998).

Similarly, the cases Ford cites which decline to apply general statutory penalties to specific wrongful conduct recognize the dissimilarity of that conduct to the behavior proscribed. *See* App. 42a (manufacture and sale of a defective product); *Continental Trend Resources, Inc.*, 101 F.3d at 641 (tortious interference with contracts); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3rd Cir. 1999), *cert. denied* (decision based on reprehensibility factor; no statutory comparison); *Broome v. Biondi*, 17 F.Supp.2d 211, 229 (S.D.N.Y. 1997) (analogous statute provided no statutory punitive damage limits; sustained award based on reprehensibility factor and low 2:1 ratio).

None of Ford's cases where the courts evaluated general statutory sanctions reduced the punitive damages

award based solely on the third factor. *See Schmizzi v. Illinois Farmers Ins. Co.*, 928 F.Supp. 760, 786 (N.D. Ind. 1996) (high ratio; no physical harm); *Lee v. Edwards*, 101 F.3d 805, 812-13 (2nd Cir. 1996) (award higher than those in more egregious cases); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-49 (9th Cir. 1998), *cert. denied* (high ratio); *Bowden*, 710 A.2d at 280 (same); *Florez v. Delbovo*, 939 F.Supp. 1341, 1349 (N.D.Ill. 1996) (same).

Although the Ammermans agree with Ford that a comparison to prior punitive damages awards is relevant to the excessiveness inquiry (Pet. 23-24), they disagree with Ford's contention that the Court of Appeals "ignored" prior caselaw in affirming this award. The Court of Appeals specifically referred to two cases prior to the accident where Indiana courts had affirmed punitive damages awards which were 150 and 68 times the actual damages. App. 44a, citing *Emerson*, 539 N.E.2d 35 and *Archem*, 549 N.E.2d 1054. Those large multiples, as well as awards of $1 million or more, gave Ford notice that Indiana courts would not hesitate to impose a large punitive award where the defendant's conduct was particularly egregious. *See Dow Chemical Co.*, 553 N.E.2d 144 ($5 million punitive award); *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513 (Ind.Ct.App. 1989), *trans. denied* ($1 million punitive award).

Moreover, Ford knew it risked a large sanction by placing dangerously defective products in the marketplace. *See*, e.g., *Stubblefield*, 319 So.2d 470 (Mustang; $8 million punitives); *Hasson v. Ford Motor Co.*, 650 P.2d 1171 (Cal. 1982), *cert. dismissed* (Lincoln; $4 million punitives); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex.Ct.App. 1982), *writ refused* (Ford; $4 million punitives); *Grimshaw*, 174 Cal.Rptr. 348 (Pinto; $3.5 million punitives). Ford cannot seriously contend that its "reckless disregard for anything but market share and the bottom line" (App. 61a) would result in a less severe sanction in Indiana than it had incurred in California, Georgia, and Texas in the decade preceding the Ammermans' accident.

The fundamental question under *BMW's* third factor is whether the wrongdoer had notice of the severity of the sanction. *BMW*, 517 U.S. at 574-75. In this case, the answer is a resounding "yes".

Moreover, to the extent a closely analogous penalty statute exists and was drafted to punish the conduct at issue, the cases Ford cited show that the lower courts are giving due consideration to the penalties authorized by statute. Accordingly, there is no conflict between jurisdictions requiring resolution by this Court.

CONCLUSION

For the foregoing reasons, Vicki Ammerman, Guardian of Pamela Ammerman, and Lana Ammerman, respectfully requests that certiorari be denied.

February 18, 2000

Respectfully submitted.

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